Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992:	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

COMMENTS OF LIFETIME TELEVISION

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TABLE OF CONTENTS

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COMMENTS OF LIFETIME TELEVISION

Lifetime Television ("Lifetime") hereby submits its comments in response to the Commission's Further Notice of Proposed Rulemaking (the "FNPRM") in the above-referenced proceeding which proposes new rules governing the methods for leasing capacity on a cable system pursuant to Section 612 of the Communications Act.[1]

I. SUMMARY

As a non-vertically integrated programmer in need of cable carriage in order to ensure its economic viability, Lifetime is concerned that the Commission's proposed formula for determining leased access rates will cause a fundamental change in the economics of programming, to the detriment of both consumers and programmers. Specifically, Lifetime submits the following:

[1] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access, MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122 (rel. Mar. 29, 1996).

- Because of capacity limitations faced by cable operators, increased usage of leased access capacity will result in the displacement of existing program services -- particularly non-vertically integrated services -- depriving these programmers not only of distribution but also of vital sources of revenue.

- The FNPRM's formula effectively provides a subsidy to leased access programmers by overstating the value of leased access programming and by requiring subscribers -- rather than the leased access programmer -- to bear a large portion of the cost of obtaining leased access.

- There is no reason to alter fundamentally the formula for determining leased access rates because the record demonstrates that consumers have access to a wide variety of diverse program sources.

- Although Lifetime agrees that a reasonable transition period is needed, the Commission's proposed transition fails to mitigate adequately the harm to programmers and consumers that will flow from a radically restructured rate formula.

- The Commission should not guarantee that leased access programmers obtain access to any particular tier of program services offered by a cable operator; such a course fails to obtain from the leased access programmer the value associated with tier placement and provides an additional source of subsidy to such programmers.

- The Commission should maintain its existing treatment of part-time programmers.

II. OVERVIEW

Lifetime has established an identity for itself as "television for women" -- the program network that targets women with an entire telecast schedule of high-quality, contemporary programming. Lifetime has become one of the most widely distributed and highest-rated of the basic cable program services. Reaching in excess of 90% of all cable homes, Lifetime ranked fifth in prime time and total day ratings among all basic cable services during the first quarter of 1996. Lifetime's production of "Almost Golden: The

Jessica Savitch Story" was the highest-rated movie in the basic-cable business for 1995.[2] Last month, Women in Cable & Telecommunications recognized another of Lifetime's original movies -- "Choices of the Heart: The Margaret Sanger Story" -- with a "Tribute Accolade" award, which is given to a production portraying the life of a woman with significant impact on issues and events. In March, Lifetime was honored by Girls, Inc. for providing positive and realistic role models on television for young girls and women.

Despite this success, Lifetime, as a non-vertically integrated programmer, has viewed with alarm the potential fall-out of the FNPRM's proposed leased access rules for the economics of the programming business. Accordingly, Lifetime respectfully submits that the proposed rules must be revised both to better reflect the costs to cable operators of providing leased access and to ameliorate the potential harm to programmers and the viewing public that is sure to flow from any displacement of existing program services.

III. IN FASHIONING ANY CHANGES TO THE LEASED ACCESS RULES, THE COMMISSION SHOULD SEEK TO MITIGATE ANY HARM TO EXISTING PROGRAMMERS

In fashioning a leased access policy, Lifetime urges the Commission to consider the effect that any increase in leased access usage -- particularly an increase spurred by artificially low rates -- will have on programmers and the viewing public. Because of the capacity limitations faced by most cable systems today, any increase in the use of leased access channels is likely to result in the removal of existing, non-leased access program services from cable systems. Indeed, because of the need to displace existing services, it is

[2] See, e.g., The Hollywood Reporter, NCTA Special Issue, April 26, 1996 at N-2.

likely that any increased use of leased access would not increase diversity, but would merely result in the replacement of one non-affiliated programming source with another.

Recognizing the potential harm to existing programmers, the Commission proposes to provide a transition period in which to "phase in" a new rate formula in order to ameliorate the consequences of "bumping" existing programmers.[3] The Commission properly notes that a transition is needed to (i) avoid penalizing operators and programmers for decisions based on prior rules; and (ii) mitigate any sudden disruption to subscribers' program line-ups. Lifetime strongly supports the use of a transition period, but submits that the transition suggested in the FNPRM is insufficient to avoid the harms to consumers and programmers acknowledged by the Commission.

For the most part, Lifetime believes that the proposed transition fails to accomplish the goals contemplated by the Commission because it is too limited in scope and too abrupt in manner to provide meaningful relief. Accordingly, Lifetime submits that the Commission should (i) adopt an approach similar to that contained in the 1984 Act's original leased access provision and allow cable operators to retain any service being provided to subscribers on the effective date of any new leased access rate formula;[4] (ii) confirm that a cable operator's need to comply with any leased access requirement does not enable it to abrogate any existing programming contracts; and (iii) lengthen the transition period and alter the schedule for reducing rates to those called for by a new formula.

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[3] FNPRM at ¶ 98-99.

[4] Compare 47 U.S.C. § 532(b)(1)(E).

Such a course of action will reduce disruption to consumers and programmers because, among other things, it will allow cable operators additional time to upgrade plant (whether by use of fiber, digital technology, or otherwise), thereby easing the current capacity crunch. Once additional capacity is available, there will be little or no need for cable operators to displace existing programming in order to accommodate leased access programmers.

Moreover, such a course will minimize the harms to existing programmers that would result from the fundamental changes to the economics of programmers caused by the potential displacement of programmers by increased leased access usage. Lifetime's business plans are based on the current economics of advertiser-supported cable programmers -- the dual revenue streams provided by advertising and cable operator license fees. Lifetime currently derives nearly one-third of its revenue from license fees. These fees are critical to Lifetime's commitment to invest significant resources in the production of original programming for the network.

Lifetime estimates that it will spend approximately $112 million dollars this year on the production of original programming -- an investment that would not be possible if Lifetime were forced to pursue a leased access strategy for obtaining distribution, and thereby be deprived of license fees from cable operators. To maintain its competitive position as one of the top 5 highest rated basic cable networks, Lifetime has increased its programming budget by 265% since 1990; programming costs represent more than 60% of

Lifetime's total budgeted expenses for 1996.[5] In addition, Lifetime has in excess of $225 million in long-term programming commitments through 2004.

Indeed, for this reason alone, it is critical that existing programmers are not displaced as a result of increased use of leased access capacity and that cable operators not be allowed to abrogate their carriage agreements with programmers.[6] Moving to a leased access model of business -- even at the low rates that would result from implementation of the proposed formula -- would deprive programmers of an essential source of revenue.[7] Moreover, even the threat of abrogation could increase substantially the leverage that cable operators can exert over programmers.

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[5] In addition to its programming commitments, Lifetime dedicates significant resources to its public affairs campaigns. The 1996 "Go Vote" campaign recently applauded by Chairman Reed Hundt during an NCTA convention address, combined with Lifetime's commitment to Drug Free America, are valued at more than $4 million. In 1995, Lifetime committed in excess of $1 million to the fight against breast cancer.

[6] Lifetime has not had adequate time or, indeed, information, to assess the economics of leasing capacity on only those -- hopefully relatively few -- systems on which it is bumped. Such a course appears to have some serious disadvantages, however. Once cable operators see that a particular programmer is willing to lease capacity, it is likely that they will designate that service to be bumped to make room for leased access programmers. Again, such a result would wreak havoc on the business plans of existing programmers.

[7] Similarly, Lifetime's advertising revenues are often structured over a multiple year time frame. Since the advertising rates are based on a "cost per thousand" which factors in carriage or distribution, if Lifetime loses any of its distribution, through leased access or otherwise, the multi-year advertising arrangements will generate less revenue for Lifetime which will in turn result in less money to spend on programming and public affairs campaigns. As a practical matter, for every $1 of license fees lost, Lifetime would lose additional advertising revenue and would therefore need to reduce its programming budget by more than $1 just to maintain the status quo.

If, however, some displacement is to occur, a lengthened transition period is needed to allow programmers without a contractual right to continued carriage sufficient time to revise their business plans to deal with the new programming economics that will result. Lifetime thus suggests that, if a cable operator would be required to bump an existing program service in order to accommodate a request for leased access, the cable operator should be able to continue charging the leased access programmer under the current formula for a period of five (5) years. At the end of this period, rates would be determined by the new formula. This period of time would allow cable operators to expand capacity as well as enable programmers designated for removal sufficient time to revise their business plans.

IV. THE FORMULA PROPOSED BY THE COMMISSION IS UNWORKABLE AND WOULD LEAD TO UNINTENDED RESULTS

Lifetime is especially concerned about the possibility of displacement because of the proposal to replace the existing formula for determining the rates that cable operators may charge for leased access with a "cost/market rate" formula.[8] The FNPRM states, on several occasions, that it is not the Commission's intent to create a rate formula that would effectively subsidize leased access programmers, or necessarily to design a cost formula to lower rates for leased access programmers. Yet based upon operator feedback, Lifetime understands that, far from creating an "economically sound mechanism" for determining leased access rates, the proposed formula likely will result in drastically reduced rates for

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[8] FNPRM at ¶ 63.

leased access -- approaching zero or negative rates -- that effectively subsidize leased access programmers.

Lifetime believes that the unintended "zeroing out" of leased access rates results, among other things, from the formula's failure to fully account for certain costs and by mistaken assumptions as to the value of particular program services and tier placement. For example, as the Commission acknowledges, the formula does not take into account the cost to the cable operator of replacing popular programming with leased access programming. Such a result would likely lead some subscribers to defect from cable to other distribution technologies that are not required to lease channels and are instead free to carry popular channels that capacity-strapped cable operators must delete. While recognizing this very real cost, the Commission fails to account for it in the rate formula.[9] This cost, however, should not be ignored merely because it is difficult to quantify. Rather, a surrogate should be used to offer at least a rough cut at justice. Indeed, the Commission has utilized surrogates or proxies to determine values or costs that are difficult to quantify in other contexts and should develop a surrogate here as well.[10]

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[9] FNPRM at ¶¶ 85-86.

[10] See, e.g., Local Competition NPRM, CC Docket No. 96-98 (rel. April 19, 1996) (proposing proxy for cost-based rates to set rate ceilings); CMRS Interconnection NPRM, CC Docket No. 95-185, CC Docket No. 94-54 (rel Jan. 11, 1996) (proposing proxy to determine cost-based prices).

In add[illegible] that every channel on a tier is of equal value to s[illegible]eraging approach does not accurately reflect the value [illegible]scribers and has the great potential to cause a signifi[illegible] by reducing the fee paid by leased access programmer[illegible]an the value of leased access to subscribers. It is [illegible]mission's conception of costs and the presumed "equ[illegible]he least profitable channel to a cable operator is the one [illegible]service could well be the one most valued by the cable [illegible]

In sum, the [illegible]n accurate method of determining reasonable costs and [illegible]

V. THERE IS NO REASON [illegible] DRASTIC REDUCTION IN LEASED ACCESS RATES [illegible]NFLATE ARTIFICIALLY THE NUMBER OF CHANNELS [illegible]ED ACCESS PROGRAMMERS

Lifetime sub[illegible] provision is only one of several rules designed to promote [illegible]ersity,[illegible] there [illegible]educe rates substantially in order to achieve the goal [illegible]ng divers[illegible] sources.[12] The record before the Commission dem[illegible] is working to produce varied and

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[11] For example [illegible] use of capacity for affiliated programming fou[illegible]munications Act and the carriage agreement provisions [illegible]d to promote diversity in programming.

[12] See, e.g., [illegible]

robust programming. Since 1990, the number of national program services has nearly doubled.[13] Of the services now available, approximately half are owned by non-cable operators.[14] Thus, as the Commission acknowledges, the goal of this proceeding should be to establish a "reasonable" rate (taking into account the statutory considerations of ensuring that the rates do not adversely affect the operation, financial condition, or market development of the cable system), not necessarily to establish a low rate in order to maximize use of leased access capacity.

VI. THERE IS NO REASON TO PROVIDE LEASED ACCESS PROGRAMMERS WITH MANDATORY ACCESS TO ANY TIER OF CABLE SERVICE PROVIDED BY A CABLE OPERATOR

Lifetime also respectfully disagrees with the Commission's tentative conclusion that leased access programmers have the right to be placed on a tier, as opposed to being carried on an *á la carte* basis.[15] As the Commission notes, unlike the treatment of PEG and must-carry channels, Congress did not mandate any specific tier or channel location for leased access programmers.[16] Mandatory placement of a leased access programmer on a tier will, contrary to the statutory directives, adversely affect the market development of the system.

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[13] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report*, CS Docket No. 95-61, FCC 95-491, at ¶ 150 (rel. Dec. 11, 1995) (the "1995 Competition Report").

[14] *Id*. Moreover, as noted by the Commission, consummation of pending system sales will increase substantially the number of non-vertically integrated services. *1995 Competition Report*, *supra*, at ¶ 153.

[15] *FNPRM* at ¶¶ 118-120.

[16] *Id*. at ¶ 116.

As referenced above, it is likely that a cable operator will experience a reduction in subscribership as a result of the displacement of existing programming with leased access programming. Moreover, under the Commission's formula, placement on a tier effectively overstates the value of leased access programming and thus subsidizes a leased access programmer.[17]

Rather than allow the leased access programmer to be subsidized in this way, the rules should provide cable operators, to the extent technically feasible, the option of offering leased access programming either separately from any tier or on any tier agreed upon by the cable operator and leased access programmer. In such an "á la carte" environment, the value of programming will be determined by the leased access programmer and the subscriber rather than arbitrarily by a Commission formula. Moreover, there would be no need to adjust the maximum rate downward to account for imputed subscriber revenue derived from the leased access channel, thus simplifying the rate calculation and ensuring that the market, rather than the subsidized rates resulting from the proposed methodology, will determine the success or failure of a particular leased access program service.

VII. THE COMMISSION SHOULD MAINTAIN ITS EXISTING POLICY WITH REGARD TO THE TREATMENT OF PART-TIME PROGRAMMERS

Finally, the Commission asks for comment on the proper treatment of programmers seeking to lease access on a part-time basis.[18] Lifetime submits that the Commission should

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[17] See supra at 9-10.

[18] FNPRM at ¶¶ 124-126.

retain its existing policy with regard to the opening of new channels when existing leased channels are not fully occupied. Thus, although a programmer seeking leased access on a part-time basis may request a particular time slot, there should be no requirement to open up a new channel if the cable operator reasonably can accommodate the programmer on an existing channel or if the programmer is not willing to commit to a sufficient amount of channel time to warrant the opening of a second channel.

VIII. CONCLUSION

As demonstrated above, the proposed changes to the rules present a significant risk to existing programmers. Because of the capacity constraints faced by many cable systems, any increase in leased access use will cause economic hardship to existing programmers -- particularly non-affiliated programmers that the statute was designed to help. The record demonstrates, however, that the program marketplace is diverse and that there is no need for drastic changes at this time. Accordingly, Lifetime respectfully submits that the Commission should grandfather the carriage of programmers currently on the systems and lengthen the transition period for compliance with any newly adopted rate formula. Further, the Commission should maintain its existing policy that leased access programmers have no right to carriage on a particular tier. This will simplify the rate calculations and reduce one of the prime areas of subsidization contained in the proposed formula. Finally, Lifetime urges the Commission to retain its treatment of part-time leased access programmers.

Respectfully submitted,

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